YOU CAN'T SAY THAT: CONSTITUTIONALITY OF INJUNCTIONS AS A REMEDY IN DEFAMATION CASES

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Currently, circuit courts are split: some have ruled that injunctions on future speech may be consistent with freedom of speech, while others have held that they always violate the First Amendment. The Supreme Court granted certiorari on this question in Tory v. Cochran *but ruled on narrower grounds, without resolving the split. Absent consensus, the availability of injunctions on future speech, especially in the context of defamations, remains unclear for the attorneys who seek these injunctions and for the courts that must decide whether to grant them.*

Thus, there is a need for a piece that analyzes the circuit split under the Supreme Court's First Amendment jurisprudence to determine whether and under what circumstances such injunctions could be constitutionally permissible. While other scholars have written on the subject, most prominently Erwin Chemerinsky, and have concluded that injunctions on future speech are prior restraints on speech, no piece has recognized that these injunctions may nonetheless be constitutional under certain circumstances. This Note, after thorough constitutional analysis of injunctions on future speech, agrees that they are prior restraints, but concludes that they may sometimes fall under the traditional exceptions to the Supreme Court's prior restraint doctrine. This Note further lays out the specific situations and safeguards under which injunctions on future speech pass constitutional muster in order to guide practitioners and courts in protecting victims of defamation while still protecting the defamer's right to free speech.

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I. INTRODUCTION

In November 2010, a prominent Harvard scientist and entrepreneur named Dr. Hayat Sindi visited the Thanksgiving dinner of Samia El-Moslimany and her husband.[1] Following the dinner, Samia developed a suspicion that her husband and Dr. Sindi were involved in an adulterous relationship.[2] Regardless of whether this suspicion was founded, Samia and her mother, Ann, began a five-year campaign of harassment against Dr. Sindi.[3] Samia accused Dr. Sindi of "fraudulently obtaining her doctorate by paying a colleague to ghostwrite her dissertation, repeatedly lying about her age in order to obtain awards meant for younger scientists, and inflating her resumé."[4] Not only were these statements false, Samia and Ann did almost no research on them, manipulated sources to fit their narrative, and made wild inferences from little information.[5]

Samia and Ann went to great lengths to publish these accusations. They sent them to Dr. Sindi's business contacts, including members of the scientific community and Dr. Sindi's investors, over a period of years.[6] They posted them in comments on forums, Amazon, Facebook, the Washington Post, and many

1. Sindi v. El-Moslimany, 896 F.3d 1, 11 (1st Cir. 2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. The jury ruled these statements were defamatory, and that Samia and Ann had a reckless disregard for the truth in making them. *See* Sindi v. El-Moslimany, No. 13-cv-10798-IT, 2016 WL 5867403, at *4 (Mass. Dist. Ct. Oct. 6, 2016).
6. *Sindi*, 896 F.3d at 11.

articles and other media about Dr. Sindi.[7] Samia even handed out flyers and pamphlets containing the accusations at several conferences at which Dr. Sindi was a speaker.[8]

Samia did other things to harass Dr. Sindi. She traveled to Dr. Sindi's mother's residence and sent emails and text messages to Dr. Sindi stating that she wished Dr. Sindi would be "ruined professionally and personally," and expressing hope that she would get cancer.[9] As a result of Samia and Ann's five-year harassment campaign, Dr. Sindi lost business opportunities, suffered damage to her reputation, and experienced physical symptoms of emotional distress.[10]

Dr. Sindi sued Samia and Ann for defamation, intentional infliction of emotional distress, tortious interference with contract, and tortious interference with advantageous relations.[11] The jury found for Dr. Sindi and awarded her $3.5 million in damages.[12] The District Court also granted Dr. Sindi's motion to enjoin the El-Moslimanys from publishing "orally, in writing, through direct electronic communications, or by directing others to websites or blogs reprinting" the statements that the jury concluded were defamatory.[13]

A prominent scientist, a jealous wife, and a vigilante mother provide an example of the often-dramatic backdrop that accompanies defamation cases. Also dramatic is the unsettled area of First Amendment jurisprudence that underlies the remedies in some of these cases. Currently, circuit courts are split: some have ruled that injunctions against future speech in defamation cases may be consistent with the First Amendment in certain circumstances,[14] while others have held that they are always unconstitutional.[15] The Supreme Court granted certiorari on the question in *Tory v. Cochran*, but ended up ruling on narrower grounds, without resolving the split.[16] The First Circuit, on review of the *Sindi* case in July 2018, ruled the injunction was overly broad, but refused to rule on

7. *Id.*

8. *Sindi*, 2016 WL 5867403, at *2.

9. *Id.*

10. *Id.* at *2–*3.

11. *Id.* at *1.

12. *Id.*

13. *Sindi*, 896 F.3d at 59–60. The enjoined statements were: 1) "That Hayat Sindi is an academic and scientific fraud;" 2) "That Sindi received awards meant for young scholars or other youth by lying about her age;" 3) "That Sindi was fraudulently awarded her PhD;" 4) "That Sindi did not conduct the research and writing of her dissertation;" 5) "That Sindi's dissertation was 'ghost researched' and 'ghost written;'" 6) "That Sindi's role in the founding of Diagnostics For All was non-existent, and that Sindi did not head the team of six people that won the MIT Entrepreneurship Competition." *Id.*

14. *See* McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015); Lothschuetz v. Carpenter, 898 F.2d 1200, 1208–09 (6th Cir. 1990).

15. *See* Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001); Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 673 (D.C. Cir. 1987).

16. 544 U.S. 734, 737–38 (2005) (holding that it was "unnecessary, indeed, unwarranted, for us to explore [whether] . . . the First Amendment forbids the issuance of a permanent injunction in a defamation case").

the wider question of whether injunctions on future speech are ever constitutional.[17] Thus, the current state of the law remains unclear.

This Note addresses the constitutionality of injunctions on future speech as a remedy in defamation cases. Part II of the Note reviews the development of the law in this area, starting with the traditional view that equity will not enjoin a defamation,[18] and tracing the issue through the Nation's founding into modern times.[19] It also discusses well-settled concepts of First Amendment free speech jurisprudence, including the presumed unconstitutionality of prior restraints on future speech.[20] Finally, it explores three different approaches modern courts have taken.[21]

Part III analyzes this precedent by first exploring the particular problems of injunctions on free speech in defamation cases and comparing them to other types of judicial remedies.[22] It then turns to prior restraints, comparing injunctions on defamatory statements to other recognized types of prior restraints, and then to recognized exceptions to the doctrine.[23]

Part IV recommends that courts apply traditional prior restraint doctrine and presume injunctions on future speech are unconstitutional.[24] But, this Note also recommends that they are not always unconstitutional, and that if the injunction falls under one of the existing recognized exceptions to the prior restraint doctrine, and has the procedural protections recommended in this Note, it should be upheld.[25] This approach does not leave victims of defamation without recourse when their interest is weighty enough but better protects everyone's right to the freedom of speech.

17. *Sindi*, 896 F.3d at 36 (1st Cir. 2018) ("The post-trial injunction, though, is a bridge too far . . . . We need go no further.")

18. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 308–11, 324–30 (2001).

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section II.C.

22. *See infra* Section III.A.

23. *See infra* Sections III.B–C.

24. *See infra* Part IV.

25. *See infra* Part IV.

II. BACKGROUND

A. English Common Law

Since the early days of the Republic, courts have cited the old English maxim "equity will not enjoin a libel" as their reason for not issuing injunctions on future speech.[26] This maxim derived from the structural, procedural, and cultural peculiarities of English defamation law.[27] Defamation was originally considered a matter for religious tribunals,[28] but by the end of the Seventeenth Century, common-law courts exercised jurisdiction over suits by private persons who claimed that a defamation caused "temporal damages."[29] Courts also recognized money damages as a remedy and defined the distinction between libel, which is written defamation, and slander, which is spoken.[30]

The courts of equity, however, were denied jurisdiction over defamation cases.[31] In 1742, it was ruled that the courts of equity had no jurisdiction over claims of libel and slander.[32] "For whether it is a libel against the publick [sic] or private persons, the only method is to proceed at law."[33] Since the courts of equity were the courts that issued injunctions, and common-law courts had no power to do so,[34] defamation structurally could not be enjoined, and the maxim was born.

B. First Amendment Free Speech Jurisprudence

Eventually, the maxim became indoctrinated into the idea of a free press.[35] There are two reasons for this. First, early colonists held a deep distrust of government officials, which included the judiciary.[36] In explaining this sentiment, Lord Camden rationalized, "[judges] possibly may be corrupted—juries never can! What would be the effect of giving judges the whole control of the press?

26. The inexhaustive list of early cases that use this reasoning are copied here for reference from Meyerson, *supra* note 18, at 329 n.233. *See* Francis v. Flinn, 118 U.S. 385 (1886); Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n, 19 F.2d 963 (7th Cir. 1927); Vassar Coll. v. Loose-Wiles Biscuit Co., 197 F. 982 (W.D. Mo. 1912); Edison v. Thomas A. Edison, Jr. Chem. Co., 128 F. 1013 (D. Del. 1904); Computing Scale Co. v. Nat'l Computing Scale Co., 79 F. 962 (N.D. Ohio 1897); Baltimore Car-Wheel Co. v. Bemis, 29 F. 95 (D. Mass. 1886); Donaldson v. Wright, 7 App. D.C. 45 (1895); Singer Mfg. Co. v. Domestic Sewing Mach. Co., 49 Ga. 70 (1873); Allegretti Chocolate Cream Co. v. Rubel, 83 Ill. App. 558 (1899); Everett Piano Co. v. Bent, 60 Ill. App. 372 (1895); Raymond v. Russell, 9 N.E. 544 (Mass. 1887); Whitehead v. Kitson 119, Mass. 484 (1876); Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Flint v. Hutchinson Smoke Burner Co., 19 S.W. 804 (Mo. 1892); Mayer v. Journeymen Stone-Cutters' Ass'n, 20 A. 492 (N.J. Ch. 1890); Owen v. Partridge, 82 N.Y.S. 248 (N.Y. Sup. Ct. 1903); Mauger v. Dick, 55 How. Pr. 132 (N.Y. Sup. Ct. 1878).

27. *See* Meyerson, *supra* note 18, at 309.

28. *Id.*

29. *Id.*

30. *Id.* at 310.

31. Roach v. Garvan (The St. James's Evening Post Case) (1742) 26 Eng. Rep. 683; 2 Atk. 469.

32. *Id.*

33. *Id.* at 683.

34. Meyerson, *supra* note 18, at 310.

35. *See id.* at 314–22.

36. *See id.* at 314 ("The colonial experience taught that assaults on liberty of the press could come from any of the three branches of government: the legislative, executive, or judicial.").

Nothing would appear that could be disagreeable to the Government."[37] Because judges issue injunctions and juries issue money damages, the colonial distrust of the judiciary, especially over First Amendment issues, meant that injunctions were the disfavored form of remedy for defamation cases.[38]

Second, the idea of the liberty of the press was predicated on the idea that an author could put forth whatever material he or she wanted and suffer the consequences of wrongful material after the fact, but the author could not be censored by a government entity before publication.[39] In Sir William Blackstone's famous description of liberty of the press, he stated:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.[40]

Such was the importance of the early colonist distrust in government entities having the power to control what could and could not be said, that the Founding Fathers listed the freedoms of speech and the press in the very first amendment passed under the new United States Constitution.[41] Thus, the First Amendment affirmatively prohibits laws which "abridg[e] the freedom of speech, or of the press."[42] Despite this, the Founding Fathers had trouble defining the outer limits of these freedoms, as evidenced by the passing of the Sedition Act of 1789 and the ensuing debate.[43]

The Sedition Act made it a crime, punishable by a fine and five years' imprisonment, to "write, print, utter or publish . . . any false, scandalous and malicious" statements against federal government officials "with intent to defame."[44] While the Act had the defense of truth, it was vehemently condemned by Thomas Jefferson and James Madison.[45] The General Assembly of Virginia even passed a resolution, protesting that it was unconstitutional.[46] As President, Jefferson pardoned those convicted under the Act, and Congress even repaid the fines levied against the offenders.[47] While never explicitly challenged, the Supreme Court

37. *Id.* at 308.

38. *Id.* at 319 ("It became an article of faith for those in the colonies that the jury was an essential buffer against abuses of authority, whether by governors, parliaments, or judges.").

39. *Id.* at 311 ("By the time the United States ratified the First Amendment, a consensus had developed in England that liberty of the press required the ability to put forth to the world what one wanted, as long as the printer was willing to accept the consequences of punishment for material considered illegal. No administrative licensor or censor could preview work prior to publication, and no judicial orders could prevent what could be written for the future.").

40. 4 BLACKSTONE, COMMENTARIES *152.

41. *See* U.S. CONST. amend. I.

42. *Id.*

43. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–74 (1964).

44. Sedition Act, ch. 74, 1 Stat. 596 (1798).

45. *Sullivan*, 376 U.S. at 273–74.

46. H.D. Res., 1798 Gen. Assemb. (Va. 1798).

47. *Sullivan*, 376 U.S. at 276.

declared, with the benefit of hindsight, that the Act was indeed unconstitutional in *New York Times Co. v. Sullivan*.[48] There was a visceral understanding that, at a bare minimum, freedom of speech and the press meant that the government could not stop defamation from happening beforehand and could only punish it after the fact.[49] Despite a national consensus that the Sedition Act was a complete violation of the First Amendment, the reaction to the Act is credited with creating a "national awareness of the central meaning of the First Amendment" and its importance.[50]

As a result, the American tradition has long been suspicious of "prior restraints" on future speech.[51] A "[p]rior restraint is just a fancy term for censorship, which means prohibiting speech before the speech is uttered or otherwise disseminated."[52] The Supreme Court has interpreted the First Amendment to prohibit prior restraints on future speech since its ruling in *Near v. Minnesota ex rel. Olson*.[53] The statute at issue in *Near* prohibited "malicious, scandalous, and defamatory" publications, and allowed for injunctions against offending publications.[54] Truth and good motives were a complete defense.[55] The Supreme Court, however, noted that forcing a publisher to prove the truth of a statement *before* publication, or to otherwise be enjoined, "is of the essence of censorship."[56]

The constitutional immunity against prior restraints on speech "is not absolutely unlimited," but exceptions have "been recognized only in exceptional cases."[57] Thus, anyone wanting to defend a prior restraint on speech would be tasked with "a heavy burden of showing justification for the imposition of such a restraint."[58] This is essentially the application of "strict scrutiny"—the court holds "the strong presumption" that the restraint is unconstitutional.[59] A prior restraint is only upheld where "the essential needs of public order" cannot be met through less restrictive means.[60] In addition, the restraint must be "precisely tailored" to the exigencies of the particular case such that infringing on one's constitutional rights is avoided as much as possible.[61] The Supreme Court has thus far explicitly recognized that prior restraints pass the strict scrutiny test when the restraint is levied against one of three types of speech: obscenity, speech that

48. *Id.* at 276–77.
49. Meyerson, *supra* note 18, at 320–21.
50. *Sullivan*, 376 U.S. at 273.
51. Meyerson, *supra* note 18, at 322–24; *see Sullivan*, 376 U.S. at 276.
52. McCarthy v. Fuller, 810 F.3d 456, 461–62 (7th Cir. 2015).
53. 283 U.S. 697, 713–23 (1931).
54. *Id.* at 701–2.
55. *Id.* at 721.
56. *Id.* at 713.
57. *Id.* at 716.
58. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (denying an injunction on a community group passing out certain pamphlets, despite the alleged justification that the pamphlets were "panic peddling").
59. *Sindi v. El-Moslimany*, 896 F.3d 1, 30–31 (1st Cir. 2018).
60. *Id.* at 32.
61. *Id.*

infringes on another's fair trial rights, and speech that implicates national security concerns.[62]

C. Differing Views on Injunctions in Defamation Cases

The state and history of the law as it pertains to injunctions on future speech as a remedy is unsettled. There are generally three categories that courts have fallen into on this issue. The first general stance some courts take is that an injunction on certain speech as a remedy is a prior restraint and can never be justified in the defamation context.[63] The second approach finds injunctions on future speech to be a valid equitable remedy in defamation cases and instead focuses on whether the injunction is broader than necessary to achieve its objectives.[64] The third approach recognizes the split, yet avoids the creation of a broad rule on the constitutionality of these injunctions.[65] These jurisdictions have thus far struck down injunctions on speech in defamation cases on a case-to-case basis, weighing the particular injunction against the defendant's free speech rights.[66]

1. "Prior Restraint" View

The traditional view is that the common law represents an understanding that injunctions on speech as a remedy in defamation cases are prior restraints that cannot be justified.[67] This seemed to be the generally accepted view, for "as late as the second half of the twentieth century, American courts considered it settled that libelous speech could not be enjoined, even after a finding of defamation."[68]

Residing squarely in this first category, one of the first courts to ever confront such a question was a district court in Alabama, which considered whether to enjoin a power company from attempting to steal customers from a competitor by falsely telling the customers that the competitor was insolvent.[69] The court denied the request and held that the Constitution positively forbids a court from granting an injunction as a remedy in a defamation case.[70] The court also relied upon the early English common law, which forbade such injunctions, stating it was "settled law" in the United States.[71] Additionally, civil monetary damages, according to the court, "are all that the Constitution permits any court to employ

62. Charles L. Babcock, *Types of Prior Restraints*, *in* 12 BUS. & COM. LITIG. FED. CTS. § 125:4 (Robert L. Haig ed., 4th ed. 2017) (listing out three exceptions to the Supreme Court's prior restraint doctrine). *See infra* Section III.C for an in-depth analysis on the exceptions and how defamation compares.

63. *See supra* note 15 and accompanying text.

64. *See infra* Section III.C.2.

65. *See infra* Section III.C.3.

66. *See id.*

67. Meyerson, *supra* note 18, at 326.

68. David S. Ardia, *Freedom of Speech, Defamations, and Injunctions*, 55 WM. & MARY L. REV. 1, 42 (2013).

69. Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co., 171 F. 553, 555 (M.D. Ala. 1909).

70. *Id.* at 556.

71. *Id.* at 557.

against slanders," and are what "the Constitution has declared to be the sole remedy."[72] The court noted that:

> The wrongs and injury, which often occur from lack of preventive means to suppress slander, are parts of the price which the people . . . have declared it is better to pay, than to encounter the evils which might result if the courts were allowed to take the alleged slanderer or libeler by the throat, in advance.[73]

The Second Circuit cited similar reasoning in 2001 when it struck down an injunction on a labor union using the chants "Shame On You" and "No More Lies"—statements the lower court found to be defamatory.[74] The court cited the common law maxim that equity will not enjoin a libel and characterized the maxim as "the universal rule in the United States."[75] The Second Circuit then overruled as inconsistent with the First Amendment its statement in an earlier case that an injunction may be justified by "'extraordinary circumstances,' such . . . as intimidation and coercion."[76] Any intimidation or coercion experienced is outweighed because "the First Amendment strongly disfavors injunctions that impose a prior restraint on speech."[77] Additionally, the court posited that the statements were not, in fact, defamatory, since they were made in the context of a labor dispute, which by its nature uses language calculated to produce social pressure.[78] The court noted that the overzealous language of strikes, meant to induce a change in working conditions, is a legal form of valuable speech.[79]

The D.C. Circuit also adhered to this approach until recently.[80] In the context of defamations, it routinely denied both temporary restraining orders and injunctive relief, because "[t]he usual rule is 'that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.'"[81] In a 2017 case, however, the D.C. District Court impliedly opened the door to the second approach, discussed in detail below, when it denied a motion for an injunction on future speech in a defamation case, not because of the oft-cited maxim or concerns about the First Amendment, but because it "would likely be

72. *Id.* at 556.

73. *Id.*

74. Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 176 (2d Cir. 2001).

75. *Id.* at 177 (quoting Am. Malting Co. v. Keitel, 209 F. 351, 354 (2d Cir. 1913)).

76. *Id.* at 177. The court downplayed the following statement, which seemed to imply that extraordinary circumstances might justify an injunction in certain defamation cases: "the courts of equity have no jurisdiction to restrain the publication of a libel . . . and while we do not think the facts in the case take it out of the general rule because of any conspiracy, intimidation, or coercion or because of any incidental injury to property rights." *Am. Malting Co.*, 209 F. at 357–58.

77. *Metro. Opera Ass'n*, 239 F.3d at 178.

78. *Id.* at 177.

79. *Id.*

80. *See, e.g.*, Kukatush Mining Corp. v. SEC, 309 F.2d 647, 651 n.2 (D.C. Cir. 1962). *But see* Gold v. Maurer, 251 F. Supp. 3d 127, 137 (D.D.C. 2017).

81. Cmty. for Creative Non-Violence v. Pierce, 814 F.2d 663, 672 (D.C. Cir. 1987) (quoting Kukatush Mining Corp., 198 F. Supp. 508, 510–11 (D.D.C. 1961), *aff'd*, 309 F.2d 647, 651 n.2 (D.C. Cir. 1962)); *see also* Leo Winter Assocs., Inc. v. Dep't of Health & Human Servs., 497 F. Supp. 429, 432 (D.D.C. 1980).

overly broad and does not appear to be absolutely necessary . . . because irreparable harm has not been shown."[82] The court thus seemed to imply that if the injunction were *not* overly broad, and irreparable harm *had* been shown, the court would likely uphold it.[83] Of course, a district court opinion does not have precedential effect over a circuit court, but the case illustrates a recent change in attitudes toward injunctions in defamation cases.[84]

2. The View that Injunctions Can Be Appropriate If Not Overly Broad

As illustrated by the D.C. District Court, it is a relatively recent development that courts have begun to grant injunctions on defamation as valid remedies.[85] The reason for this, according to most scholars, is the advent of the Internet and the ability of individuals to widely spread information quickly and cheaply.[86] While traditional defamation cases involved claims against the mass media, today's defamation suits are typically filed against individual bloggers or users of social media who have few assets.[87] Thus, courts may see an injunction as a more meaningful way to discourage future libels when a defendant is judgment proof.[88] Yet, many of the courts that fall into this category "have not clearly articulated why injunctions are permissible under the First Amendment and consistent with long-standing principles of equity. As a result, many judges remain confused about the availability—and proper scope—of injunctive relief in defamation cases."[89]

For example, in *Lothschuetz v. Carpenter*, the Sixth Circuit granted a "narrow and limited injunction" prohibiting the defendant from reiterating the statements the court found to be false and libelous.[90] The court did this because the majority found the injunction "necessary to prevent future injury to [the plaintiff's] personal reputation and business relations," but did not discuss the First Amendment implications of such an injunction.[91]

Most recently, the Seventh Circuit, in a 2015 opinion, tackled the traditional view that "defamation . . . can never be enjoined."[92] The majority addressed the issue of the judgment-proof defendant, who may be "undeterrable."[93] The court worried that without an injunction, the plaintiffs "will have no remedy except to sue for damages and obtain another money judgment that they won't be able to

82. *Gold*, 251 F. Supp. 3d at 137.

83. *Id.*

84. Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 158 (2007).

85. *Id.*; *see, e.g.*, McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015); San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1239 (9th Cir. 1997); Brown v. Petrolite Corp., 965 F.2d 38, 51 (5th Cir. 1992); Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990).

86. *See* Ardia, *supra* note 68, at 5; Chemerinsky, *supra* note 84, at 158; Jim Stewart & Len Niehoff, *Zombies Among Us: Injunctions in Defamation Cases Come Back from the Dead*, 30 COMM. LAW. 28, 29 (2014).

87. Ardia, *supra* note 68, at 4–5.

88. Stewart & Niehoff, *supra* note 86, at 28–29.

89. Ardia, *supra* note 68, at 5–6.

90. 898 F.2d at 1208 (Wellford, J., concurring in part).

91. *Id.* at 1208–09.

92. McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015).

93. *Id.*

collect."[94] Despite these concerns, the court still struck down the injunction because the court found it to be overly broad.[95] The jury, in fact, had not indicated which statements it found to be defamatory, yet the judge included certain statements in the injunction, like "McCarthy physically threatened Fuller," as well as "any similar statements that contain the same sorts of allegations or inferences, in any manner or forum."[96] It was because of the improper scope of the injunction, then, and not First Amendment concerns, that the court struck down the injunction.[97] It did not meet the Seventh Circuit's test "that the injunction is no 'broader than necessary to provide relief to plaintiff while minimizing the restriction of expression.'"[98]

The Ninth Circuit's approach is perhaps the most extreme. In one case, it upheld a pretrial injunction on speech that the district court found to be defamatory.[99] The speech at issue was a union displaying a banner that a maternity ward of a hospital was "'full of rats,' . . . the most natural reading" of which, according to the court, "is that the Hospital has a rodent problem."[100] This "crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact."[101] The defendant's argument that the injunction was a "prior restraint on speech" was thus rendered "moot," according to the court, because "[t]he First Amendment does not protect fraud."[102] It would seem that the Ninth Circuit, then, has adopted the stance that any fraudulent or defamatory statement is not constitutionally protected and can always be enjoined.[103]

All of this confusion has left lower courts without a rubric to guide them. Some lower courts "have issued astonishingly broad injunctions,"[104] some even ordering defendants to never mention the plaintiff's name again,[105] or to remove entire websites.[106] Even though these injunctions are so broad that they raise obvious First Amendment issues, "these judges seem oblivious to the constitutional ramifications of their orders, viewing injunctive relief as just another remedy available to tort plaintiffs."[107]

94. *Id.*
95. *Id.* at 463.
96. *Id.* at 460–61.
97. *Id.* at 463.
98. *Id.* at 462 (citations omitted).
99. San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1239 (9th Cir. 1997).
100. *Id.* at 1236.
101. *Id.* at 1237.
102. *Id.* at 1239.
103. *Id.*
104. Ardia, *supra* note 68, at 5.
105. *See, e.g.*, Eppley v. Iacovelli, No. 1:09-CV-386-SEB-JMS, 2009 WL 1035265 (S.D. Ind. Apr. 17, 2009); Cochran v. Tory, No. BC239405, 2002 WL 33966354 (Cal. Super. Ct. Apr. 24, 2002), *vacated*, 544 U.S. 734 (2005).
106. *See, e.g.*, Bluemile, Inc. v. Yourcolo, LLC, No. 2:11-CV-497, 2011 U.S. Dist. LEXIS 62178, at *5 (S.D. Ohio June 10, 2011).
107. Ardia, *supra* note 68, at 6.

3. Case-by-Case Approach

Many courts, including the Supreme Court, have attempted to avoid making a broader ruling on the overarching question of injunctions on defamation by deciding cases on narrower grounds. The case discussed in the introduction, *Sindi*, was one such case.[108] The court applied the judicial canon of constitutional avoidance, which recommends "forgoing broad constitutional holdings unless such holdings are unavoidable."[109] Thus, in its ruling, the court did "not decide . . . the broader question of whether the First Amendment will ever tolerate an injunction as a remedy for defamation."[110] Recognizing the injunction as a prior restraint on speech, the majority applied strict scrutiny to the analysis.[111] Because the injunction forbade publishing six statements about Dr. Sindi, in any forum, for any purpose, regardless of context, the court found the injunction not to be narrowly tailored to avoid censoring protected speech.[112] The injunction was thus struck down because it failed "the First Amendment requirement that it be 'tailored as precisely as possible to the exact needs of the case.'"[113]

The Supreme Court used similar reasoning when the issue was presented in *Tory v. Cochran*.[114] In the case, Tory falsely claimed that Cochran, a lawyer, owed him money.[115] He wrote to the bar association, picketed Cochran's law firm, and sent threatening letters.[116] After Tory testified that he would not stop his activity despite losing the defamation suit, the lower court issued a permanent injunction prohibiting Tory "from 'picketing,' from 'displaying signs, placards or other written or printed material,' and from 'orally uttering statements' about Johnnie L. Cochran, Jr., and about Cochran's law firm in 'any public forum.'"[117] Roughly a month after oral argument before the Supreme Court, however, Cochran died.[118] As a result, the Supreme Court passed on the constitutional issues, because "Cochran's death makes it unnecessary, indeed unwarranted, for us to explore petitioners' basic claims."[119] The case was merely remanded because the grounds for the injunction (protecting Cochran) were diminished by Cochran's death.[120] As written, this made the injunction "an overly broad prior restraint on speech, lacking plausible justification."[121] Interestingly, the Supreme

108. Sindi v. El-Moslimany, 896 F.3d 1, 30 (1st Cir. 2018); *see supra* Part I.
109. *Sindi*, 896 F.3d at 30.
110. *Id.*
111. *Id.* at 31–32.
112. *Id.* at 35.
113. *Id.* at 34 (quoting Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 184 (1968)).
114. 544 U.S. 734, 737–38 (2005).
115. *Id.* at 735.
116. *Id.*
117. *Id.* at 736.
118. *See id.*
119. *Id.* at 737.
120. *See id.*
121. *Id.*

Court expressly disclaimed any view on the constitutionality of any new injunction.[122]

It is clear, from the preceding discussion, that the present state of the law on injunctions on defamation is not established. So, what is the right answer? Are injunctions on defamations entirely precluded by the First Amendment's prohibition on prior restraints? Are they valid when they are not overly broad? Is there a general exception to constitutionally protected speech for defamations? Part III addresses these questions.

III. ANALYSIS

This analysis starts with a look at the unique issues and concerns implicated by injunctions in the defamation context, including the prospectivity and inflexibility of the remedy, and the likelihood that monetary damages are not a sufficient remedy. Next, this analysis takes a general view, analyzing how the Supreme Court has handled other types of prior restraints, including the policy and practical concerns implicated, and comparing them to injunctions as a remedy to defamation. Finally, the three recognized exceptions to the Supreme Court's general prohibition on prior restraints (obscenity, infringement on fair trial rights, and national security) are analyzed, and the possibility that defamation could be a new exception is discussed and weighed.

A. The Particular Problems of an Injunction as a Remedy to Defamation

1. Comparison to Statutes

When a restriction on some sort of speech takes the form of a court-issued injunction as opposed to a statute, the risk of infringing on speech protected under the First Amendment increases.[123] As the Supreme Court stated in *Madsen v. Women's Health Ctr.*, "Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances."[124] There are two reasons for this.

First, an injunction must be obeyed until modified, reversed, or dissolved, or the infringer will be held in contempt.[125] The "collateral bar rule" holds that during contempt proceedings, the injunction's unconstitutionality is no defense to disobedience and will not be considered.[126] For example, even if an injunction

122. *Id*. at 738–39 ("We express no view on the constitutional validity of any such new relief, tailored to these changed circumstances, should it be entered."). For a full analysis of the facts and issues of *Tory*, see Chemerinsky, *supra* note 84, at 158–163.

123. Madsen v. Women's Health Ctr., 512 U.S. 753, 764 (1994).

124. *Id.*

125. "It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, . . . its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." Walker v. City of Birmingham, 388 U.S. 307, 314 (1967) (quoting Howat v. State of Kansas, 258 U.S. 181, 189–90 (1922)).

126. Ardia, *supra* note 68, at 36–37; *see, e.g.*, Metro. Opera Ass'n v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 239 F.3d 172, 176 (2d Cir. 2001).

would "unquestionably be subject to substantial constitutional question," is "erroneous," or the court applies a "void law going to the merits of the case," the injunction "must be obeyed."[127] Indeed, the only two ways to challenge an injunction are to appeal it and hope it is reversed for error, or to file a separate suit seeking the injunction to be modified or dissolved.[128] This is time consuming, expensive, and could take years in the legal system to resolve—in the meantime, obedience to the injunction is mandatory. In contrast, disobedience to a statute can be defended by alleging that it is unconstitutional or otherwise erroneous.[129] For example, a person charged under the statute cannot be held liable if the court rules that the statute is unconstitutional.[130] Yet, no matter how seemingly unfair or unconstitutional an injunction may be, it must be followed until modified or dissolved.[131] This should make one wary of encouraging a type of injunction that is especially likely to impede on constitutional rights.

Second, injunctions are particularly ripe for abuse because, unlike statutes, they apply to a single person instead of to everyone or to a broadly defined group. When there are abuses of constitutional rights by the legislature, typically many people are affected, which garners attention.[132] Those affected can organize and use democratic power to petition, remove, or threaten to remove offending legislators from office, and use political action groups to change policy. Conversely, if a judge abuses an individual's constitutional rights by way of an injunction, there is no democratic check on the action. The only person or entity affected is the unsuccessful defendant, which is unlikely to garner attention from others.[133] Even if it were to inspire other people to action, there is nothing that can be done about an erroneous injunction because the people generally have no power against federal judges democratically,[134] and no other branch of government acts as a check or balance against the rulings of the judicial branch.[135] Thus, a judge could conceivably wield his or her power in an egregious manner against a single defendant, with not much by way of a check on constitutional rights violations

127. *Walker*, 388 U.S. at 314, 317 (quoting *Howat*, 258 U.S. at 189–90).

128. *Id.* at 314, 318.

129. *See* Chemerinsky, *supra* note 84, at 165 ("Violations of an injunction, even an unconstitutional injunction, are punishable by contempt, while violations of unconstitutional laws never can be punished.").

130. Note, however, that one's own opinion that a statute is unconstitutional does not provide a defense. The court must also agree.

131. *See* Chemerinsky, *supra* note 84, at 163 ("The injunction means that a person can only speak by going before the judge and getting permission. That is the very essence of a prior restraint.").

132. *See, e.g.*, Sedition Act, ch. 74, 1 Stat. 596 (1798); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964).

133. *See* Chemerinsky, *supra* note 84, at 172.

134. *See, e.g.*, U.S. CONST. art. III. Federal judges serve lifetime appointments and cannot be voted in or out of office, thus insulating them from democratic power. *Id.*

135. *See* Lee A. Casey & David B. Rivkan, Jr., *Judges Who Would Be King*, SLATE (Aug. 14, 2009, 7:15 AM), https://slate.com/news-and-politics/2009/08/today-s-unprecedented-expansion-of-judicial-powers.html ("[A]nyone who cares about . . . the individual liberty [the government] is designed to protect, should ask themselves who now checks and balances the judges.").

besides appealing the ruling.[136] These injunctions can thus fly under the radar, abusing constitutional rights one defendant at a time.

2. Comparison to Other Judicial Remedies

Injunctions also have a higher likelihood of infringing on one's First Amendment free speech rights than other judicial remedies. For example, common law defamation actions for money do not violate free speech principles, despite punishing a type of speech.[137] While the First Amendment relies on the competition of good ideas to correct bad ideas, and not on judges or juries, there is little constitutional value in false statements of fact.[138] Thus, the minimal free speech concerns implicated by punishing defamation with money damages is outweighed by "the legitimate state interest in compensating private individuals for wrongful injury to reputation."[139]

The Supreme Court, however, was careful to note that there are limits to money damages because of their delicate balancing act with First Amendment protections.[140] For example, punitive damages go too far:

> It is . . . appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.[141]

If the Supreme Court believes that punitive damages go beyond the "legitimate interest" of a defamation case, namely, to "compensat[e] . . . wrongful injury to reputation," then surely an injunction barring a defendant from saying certain phrases in the future as a remedy to defamation also goes well beyond this limited interest.[142]

In addition, injunctions on future speech create a greater risk of censorship than other types of remedies because when a court is asked to issue an injunction on future speech, it forms prospective relief instead of retrospective relief. Retrospective relief, like money damages or criminal sanctions, are only imposed in response to, or to correct, past conduct. For example, tort damages are granted to "make the plaintiff whole."[143] This means the calculation for damages takes all

136. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part and dissenting in part) (Injunctions are the "product of individual judges rather than of legislatures . . . . The right to free speech should not lightly be placed within the control of a single man or woman. . . . [T]he injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards.").

137. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

138. *Id.*

139. *See id.* at 347–48.

140. *Id.* at 349.

141. *Id.*

142. *Id.* at 348.

143. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006) ("The point of tort damages is to compensate, to restore the *status quo ante*, to make the

the past wrongs the plaintiff suffered into account, and seeks to put the plaintiff in the position he or she would have been in had the tort never occurred.[144] Retrospective relief is backwards-looking, and thus can be carefully tailored and precise to correct the wrong.[145]

On the contrary, with prospective relief like injunctions, the court attempts to instigate or prevent some sort of future conduct. Instead of punishing or righting a past wrong, it is meant to "deter" certain actions that have not yet occurred.[146] To be sure, there are principles of equity that cinch a court's ability to issue sweeping injunctions. For example, an injunction may not be issued unless other remedies, such as monetary damages, "are inadequate to compensate for" an injury.[147] These sorts of protections do not take away from the fact that, when a court decides what activity or speech to enjoin, it must judge in the abstract; because it has not yet happened, it becomes nearly impossible to tailor the injunction to the context.[148] Nonetheless:

> By its very nature, defamation is an inherently contextual tort. . . . Words that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice. What is more, language that may subject a person to scorn, hatred, ridicule, or contempt in one setting may have a materially different effect in some other setting.[149]

If defamations are "inherently contextual," and injunctions on future conduct cannot be tailored to context, this would seem to make injunctions on future speech in response to past defamations almost by definition an inappropriate remedy.

By way of an illustration, the First Circuit in *Sindi* discussed how certain phrases the lower court enjoined were too broad when taken out of context.[150] One such phrase was "Sindi 'is an academic and scientific fraud.'"[151] If Samia and Ann El-Moslimany were to learn that Dr. Sindi actually had fraudulently published a study, they would not be able to speak the truth.[152] If a reporter were to ask them the outcome of the case, they could not say, "the jury found that we defamed Dr. Sindi by saying she is a fraud."[153] And even if they had a change of heart and wanted to issue an apology letter stating, "We are sorry for saying that

plaintiff whole. . . . [T]he immediate purpose of a tort suit is to compensate the victim with an amount of money equal to the losses suffered because of the tort.").

144. *Id.*

145. *In re* Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986) (noting that, unlike prior restraints, "a judgment for damages or a criminal sanction may be imposed only after a full hearing with all the attendant procedural protections.").

146. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 (1975) (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944)) ("The historic injunctive process was designed to deter, not to punish.").

147. Sindi v. El-Moslimany, 896 F.3d 1, 31 (1st Cir. 2018) (quoting eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006)).

148. *See Sindi*, 896 F.3d at 33.

149. *Id.*

150. *Id.* at 34.

151. *Id.*

152. *Id.*

153. *Id.*

Dr. Sindi is a fraud," they would be enjoined.[154] In any of these situations, the El-Moslimanys would open themselves up to contempt sanctions, and even jail.[155] Because defamation is so inherently contextual, "even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same comments cannot guarantee satisfaction of the elements of defamation at every point in the future."[156]

The courts which have adopted the approach of allowing injunctions as a remedy for defamation often cite the fear that damages and sanctions as remedies may not be adequate, thus meeting the equitable requirement for an injunction.[157] The Seventh Circuit, in *McCarthy*, discussed the issue of the judgment-proof defendant who would not be affected by money damages, and thus must have some sort of check placed on his or her actions.[158] As the court noted, an indigent defendant:

> [W]ould continue defaming the plaintiff, who after discovering that the defamer was judgment proof would cease suing, as he would have nothing to gain from the suit, even if he won a judgment. It is beyond unlikely that [the defendants] can pay what the judge has ordered them to pay the plaintiffs. They will be broke, and if defamation can never be enjoined, they will be free to repeat all their defamatory statements with impunity. [The plaintiffs] will have no remedy except to sue for damages and obtain another money judgment that they won't be able to collect.[159]

This problem is not unique to defamation, however. It is often faced in any tort context—"the amounts that . . . can [be] recover[ed] in the real world are often reduced because . . . so many tortfeasors are uninsured, underinsured, or judgment-proof."[160] Yet, courts do not find that damages are inadequate just because a defendant cannot pay them.[161] And even if the court were to recognize that recovery for the plaintiff may be reduced, the harm of stampeding a defendant's free speech rights may outweigh this concern.

But the plaintiff is not without hope. A successful plaintiff in a defamation case has a unique advantage that can help offset the judgment proof defendant problem: the fact that a jury of up to twelve people agreed with the plaintiff that

154. *Id.*

155. *See id.*

156. Chemerinsky, *supra* note 84, at 171.

157. *See* McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015); *see also* eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

158. *McCarthy*, 810 F.3d at 462.

159. *Id.*

160. COORDINATION OF BENEFITS HANDBOOK, BUS. & LEGAL RES. ¶650 (2018).

161. *See* Chemerinsky, *supra* note 84, at 170. Chemerinsky also worries that if courts apply injunctions only to judgment proof defendants, "poor people [will] have their speech enjoined, while the rich [will be] allowed to speak so long as they pay damages." *Id.*

the statements are false.[162] So, if the defendant ever were to make the same statements again, the plaintiff could point to the judgment as proof that the defendant is lying and thus protect him or herself from feared reputation damage.

While the threat of retrospective relief does often prevent people from saying certain things they would otherwise say (because, for example, the person wants to avoid paying money if they were to be sued), there is no specific speech content that is banned.[163] Injunctions, however, ban specific phrases or words from ever being said.[164] When the only threat is retrospective relief like money damages, the person can still choose to take the risk of saying what he or she wants to say. The judicial system then judges the wrongfulness of the speech after the act, taking the entire context of the speech into account.[165] On the other hand, "parties facing a judicial directive to refrain from speaking typically remain silent, even when they believe their speech is fully protected from subsequent sanction."[166] And, if a person wants to say the enjoined content in a non-defamatory way, the person must go to the court and move to modify the injunction in light of any changed circumstances, essentially requiring a judicial permission slip to engage in truthful speech.[167] This is the epitome of censorship.[168]

In essence, an injunction on future speech is worse than other remedies because it is a prior restraint on speech. For, "[a]lthough the threat of damages or criminal action may chill speech, a prior restraint 'freezes' speech before the audience has the opportunity to hear the message."[169]

B. Traditional Categories of Prior Restraints and Injunctions on Future Speech Compared

According to the Supreme Court, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[170] The classic example of a prior restraint on speech is a legislative statute, like the Sedition Act, which prohibited "false, scandalous and malicious" statements against federal government officials,[171] or the statute at issue in *Near*,

162. Across the states, the size of civil juries ranges from four in Utah (for cases under $20,000 at stake), to twelve in thirty-two different states. *51c Civil Juries*, NAT'L CTR. FOR STATE COURTS, https://webcache.googleusercontent.com/search?q=cache:zB2UnyI0lD4J:https://www.ncsc.org/~/media/Microsites/Files/SCO/Archive2012/Table%252051.ashx+&cd=13&hl=en&ct=clnk&gl=us&client=firefox-b-1-ab (last visited Jan. 29, 2020).

163. This creates a content-neutral restriction. *See* Malla Pollack, *Litigating Defamation Claims*, 128 AM. JUR. TRIALS 1, 29 (2013) (explaining that, to be a cause of action, the defamation must only be "false" and "tend[] to harm the reputation of another").

164. *See, e.g.*, Sindi v. El-Moslimany, 896 F.3d 1, 60 (1st Cir. 2018).

165. Meyerson, *supra* note 18, at 320–21.

166. Ardia, *supra* note 68, at 37–38.

167. *Sindi*, 896 F.3d at 34–35.

168. *See* Near v. Minnesota *ex. rel.* Olsen, 283 U.S. 697, 713–23 (1931); *see also* Chemerinsky, *supra* note 84, at 172.

169. Matter of Providence Journal Co., 820 F.2d 1342, 1345–46 (1st Cir. 1986).

170. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

171. Sedition Act, ch. 74, 1 Stat. 596 (1798).

which prohibited "malicious, scandalous, and defamatory" publications.[172] When a statute proscribes a certain type of speech, it not only punishes the speech after the fact, but stops the speech from being uttered in the first place, presumably by law-abiding citizens who would have expressed the speech if not for the statute. This is why courts often repeat that a prior restraint halts speech "before the audience has the opportunity to hear the message."[173]

Yet, the First Amendment does not just protect citizens from governmental overreach by the legislature, but from every governmental institution including the Executive Branch (in the form of agencies) and the Judiciary. "It is not within the authority of any court, or of any other governmental agency, by any sort of censorship to abridge the right belonging to every man to freely speak and publish his sentiments."[174]

Taken together, sometimes legislative, executive, and judicial actions constitute a prior restraint on speech.[175] In *Cantwell v. Connecticut*, the Connecticut Legislature enacted a statute which outlawed solicitation "for any alleged religious, charitable or philanthropic cause . . . unless . . . approved by the secretary of the public welfare council," a state-level agency.[176] The secretary would only issue a certificate if he or she determined that the cause "conform[ed] to reasonable standards of efficiency and integrity."[177] If the secretary acted "arbitrarily, capriciously, or corruptly," his or her action was subject to judicial correction.[178]

The Supreme Court, acknowledging that general regulation of "the time and manner" of solicitation is not unconstitutional, overturned the scheme since the statute required an agency's approval to be able to speak at all, and the approval was contingent upon the government's opinion of the content of the solicitation.[179] The presence of a judicial remedy for abuses "still leaves th[e] system one of previous restraint which, in the field of free speech and press, we have held inadmissible."[180] While judicial action itself did not constitute the previous restraint in the case, the Court opined that if there were to be a statute that "authoriz[ed] previous restraint . . . by judicial decision after trial," it would be "as obnoxious to the Constitution as one providing for like restraint by administrative action."[181] One cannot ignore that the hypothetical, denounced as "obnox-

172. *Near*, 283 U.S. at 712–23.

173. Matter of Providence Journal Co., 820 F.2d at 1345–46.

174. Willis v. O'Connell, 231 F. 1004, 1010 (S.D. Ala. 1916).

175. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

176. *Id.* at 301–02.

177. *Id.* at 302.

178. *Id.* at 305.

179. *Id.* at 305–307 ("The general regulation, in the public interest, of solicitation . . . would not constitute a prohibited previous restraint . . . It will be noted, However [sic], that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. . . . Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment . . . .").

180. *Id.* at 306.

181. *Id.*

ious to the Constitution," is eerily similar to an injunction issued by judicial decision after a trial for defamation, forbidding the unsuccessful defendant from making certain statements.[182]

The Supreme Court has also consistently recognized that inaction by a court may constitute a prior restraint on speech. In *Southeastern Promotions v. Conrad*, for example, the Supreme Court ruled that *refusing* to issue an injunction allowing a party to speak was an unconstitutional prior restraint.[183] In the case, a municipal-owned theater denied an application by the musical "Hair" to show their production.[184] The theater's directors reasoned that the musical contained obscene elements such that denying the application was "in the best interests of the community."[185] In response, the production company sought an injunction allowing it to use the theater, which the District Court denied.[186] The Supreme Court ruled that the District Court's action was a prior restraint because the District Court denied relief where public officials forbade the production company from saying what they wanted to say in the theater.[187] The fact that the denial of "Hair" did not result in "total suppression of the musical," since there were other available theaters in the city, did not matter to the Court, for "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use."[188]

The Supreme Court has made it clear that prior restraints occur whenever any government actor, including a judicial officer, acts in a way that forbids a certain type of speech before it is uttered.[189] Indeed, the refusal to issue an injunction allowing someone to speak in a certain forum is a prior restraint on speech.[190] Yet, when an injunction is granted as a remedy in a defamation case, a judge chills all future speech of a certain kind in *all* forums. Further, the Supreme Court itself has recognized that injunctions on future speech, though not a traditional prior restraint category, are "a true restraint on future speech."[191] Thus, recognizing that these injunctions are prior restraints on speech is in line with, if not compelled by, the Supreme Court's First Amendment jurisprudence.

182. *Id.*

183. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 552 (1975) ("Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions.").

184. *Id.* at 548.

185. *Id.*

186. *Id.* at 548–52.

187. *Id.* at 553.

188. *Id.* at 553, 556.

189. *Id.* at 552; Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

190. *Conrad*, 420 U.S. at 552.

191. Alexander v. United States, 509 U.S. 544, 550 (1993) ("[P]ermanent injunctions . . . that actually forbid speech activities [] are . . . examples of prior restraints."); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part) ("[A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint."); *Alexander*, 509 U.S. at 572 (Kennedy, J., dissenting) (describing that the prior restraint doctrine "encompasses injunctive systems which threaten or bar future speech based on some past infraction.").

C. Exceptions to the Prohibition on Prior Restraints Versus Injunctions in Defamation Cases

Any prior restraint on speech carries with it a "'heavy presumption' against its constitutional validity," though "[t]he protection even as to previous restraint is not absolutely unlimited."[192] This means that prior restraints are not unconstitutional per se.[193] The Supreme Court has recognized a few narrowly defined subject matters to which a prior restraint may be constitutional.[194] One thing to note is that these are typically referred to as "exceptions,"[195] however, they are less exceptions to the rule than they are situations that survive the application of the strict scrutiny test.[196] In these situations, the government's interest in the restraint is especially weighty, the interests cannot be met through less restrictive means,[197] and there are sufficient procedural safeguards to keep the prior restraint "precisely tailored" to the situation such that infringing on one's Constitutional rights is avoided as much as possible.[198]

1. Obscenity

Notwithstanding the previous discussion on *Conrad*,[199] the Supreme Court has upheld prior restraints on obscene speech if there are enough procedural protections in place. Speech qualifies as obscene if it contains "sexually explicit material that violates fundamental notions of decency" and appeals only to the "prurient interest."[200] Restricting obscene speech is recognized as a weighty government interest because it is "no essential part of any exposition of ideas, and [is] of such slight social value . . . any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[201] Further, states

192. Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Near v. Minnesota, 283 U.S. 697, 716 (1931).

193. *Keefe*, 402 U.S. at 419.

194. Babcock, *supra* note 62, §§ 125:5–125:12 (listing out several exceptions to the Supreme Court's prior restraint doctrine).

195. *Id.* § 125:4.

196. *Id.* §§ 125:5–125:12.

197. *See, e.g., id.* § 125:6.

198. *Id.* § 125:4.

199. *See supra* Part III.B (discussing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), and the Court's holding that denying a musical deemed "obscene" from performing a public theater was an unconstitutional prior restraint).

200. United States v. Williams, 553 U.S. 285, 288 (2008); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65–66 (1963). "Prurient interest" means "material having a tendency to excite lustful thoughts." *See* Roth v. United States, 354 U.S. 476, 487 n.20 (1957). The court relied on the dictionary definition of "prurient," and the definition of the term "obscene" as contained in A.L.I., MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957) ("A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."). *See also* E.H. Schopler, Annotation, *Modern Concept of Obscenity,* 5 A.L.R.3d 1158 (1966).

201. *Roth*, 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

have an interest in protecting juveniles and unwilling recipients from exposure to such material.[202]

A state is not free, however, "to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."[203] Thus, to protect explicit material that does have social value, the Supreme Court has limited the scope of the obscenity exception such that "sexually graphic" material is still protected by the First Amendment.[204] As an additional check to ensure that constitutionally protected speech is not trampled upon, the prior restraint must be subject to the following procedural safeguards: (1) any restraint can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[205]

When it comes to an injunction on obscene works, the offending words, pictures, or multimedia are immutable and easily identifiable. Their meanings do not change with context, because obscene material, by definition, *only* appeals to the "prurient interest" and has no other meaning.[206] For example, in *Kingsley Books v. Brown*, a bookseller was enjoined by the court from selling a specific pornographic pamphlet.[207] Because the obscene material was a singular work, the injunction could be carefully crafted to ensure that it applied only to the pornographic pamphlet.[208] It did not expose the bookseller to contempt sanctions for distributing other future publications that are protected under the First Amendment.[209]

2. Speech that Infringes on Others' Constitutional Trial Rights

The Supreme Court has also opined that a prior restraint on speech may be upheld if it is necessary to prevent interference with another's constitutional right to a fair trial. The philosophy behind this exception recognizes that the Founding Fathers did not tell us whether one person's First Amendment right to free speech is superior to another's Sixth Amendment right to an impartial jury.[210] Thus, the court must look at the severity of the interference of the person's right to impartial jury should the other person be allowed to speak.[211] This should be weighed

202. Miller v. California, 413 U.S. 15, 18–19 (1973). The state interest is especially strong when the method of dissemination of the obscene material raises the probability of juveniles and unwitting persons receiving it. *Miller*, for example, was a case about sending pornographic advertisements in a mass-mailing campaign. *Id.* at 16–18.

203. *Bantam Books*, 372 U.S. at 66.

204. *Williams*, 553 U.S. at 288.

205. Freedman v. Maryland, 380 U.S. 51, 58–60 (1965).

206. *Bantam Books*, 372 U.S. at 65–66.

207. 354 U.S. 436, 439 (1957).

208. *Id.* at 445.

209. *Id.*

210. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).

211. *Id.* at 553–55 ("'Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, The [sic] trial courts must take strong measures to ensure that

against the severity of the interference with the right to free speech should the prior restraint be upheld.[212] To be upheld, the restraint must meet the following test: (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial, (2) there are no alternative measures that would likely mitigate the effects of such pretrial publicity, and (3) a prior restraint on publication would effectively prevent the anticipated harm.[213] Typically, such restraints take the form of pretrial restraining orders.[214]

For example, in *Stuart*, a man was arrested for the murders of six people in a small Nebraska town.[215] Because of the scandal, both local and national news outlets picked up and sensationalized the story, reporting on certain incriminating evidence that was at issue in the case.[216] This jeopardized the man's Sixth Amendment right to have an impartial jury hear his case because it was very likely that anyone impaneled on the jury would have read the news stories and already made conclusions about the man's guilt.[217] So, the court took the rare step of issuing an order forbidding the news outlets from reporting on the man's confessions or admissions and any other information that strongly implied he was guilty.[218]

The Supreme Court used a balancing test to find that the court's order unconstitutionally impeded on the news' First Amendment rights to free speech and publication.[219] The restriction met the first prong of the test—the nature and extent of pretrial publicity impaired his right to a fair trial.[220] But it did not survive the second prong because there were other, less restrictive measures that could have cured the defect, like moving the trial's venue to a place with less news coverage of the incident, postponing the trial until news coverage died down, or providing special jury instructions.[221] It also did not meet the third prong because: 1) the restriction would not have done much to ease the harm given the effect of small-town rumors; 2) predicting "what information will in fact undermine the impartiality of jurors" was impossible; and 3) the court could not have enforced the order beyond its jurisdictional borders.[222] Finally, the Court noted

the balance is never weighed against the accused.' . . . The costs of failure to afford a fair trial are high.") (quoting Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966)).

212. *Id.* at 559 ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.").

213. *Id.* at 562.

214. *Id.* at 565.

215. *Id.* at 542.

216. *Id.* ("The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations.").

217. The trial judge found "because of the nature of the crimes charged in the complaint . . . there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." *Id.* at 543.

218. *Id.* at 543–44.

219. *Id.* at 562.

220. *Id.* at 562–63 ("[T]he trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude . . . that publicity might impair the defendant's right to a fair trial.").

221. *Id.* at 563–64.

222. *Id.* at 565–67 ("It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth.").

that the subject matter of the restrictions was too broad to survive First Amendment scrutiny.[223]

3. National Security

One exception that the Supreme Court has recognized as a possibility in dictum, but has never actually been upheld in practice, is a prior restraint on speech that contains information that threatens national security.[224] Thus far, cases have indicated that such situations may arise only when the nation "is at war,"[225] during which "(n)o one would question . . . that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[226]

In the *Pentagon Papers* case, for example, the federal government sought an injunction against *The New York Times* and *The Washington Post* from publishing the contents of a classified study called *History of U.S. Decision-Making Process on Viet Nam Policy*.[227] The Supreme Court, in a short *per curiam* decision, declined to uphold the injunction.[228] Despite the Executive's argument that national security would be threatened if the papers were published, Justice Black, in his concurring opinion, wrote that "the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."[229] On the other hand, Justice Brennan's concurrence agreed that there should be a national security exception, but only if the speech would "inevitably, directly, and immediately cause the occurrence of an event" that would imperil national security.[230] Nevertheless, Justice Brennan did not believe that the national security interests at stake in the case of publishing the Pentagon Papers met this high test, because they were based too much on conjecture.[231]

Lower courts have cited similar reasoning to striking down prior restraints on speech deemed injurious to national security. For example, in a case in which the media was barred from the contents of an espionage trial, the Fourth Circuit was "troubled . . . that disclosure of classified information could endanger the

223. "To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: There is nothing that proscribes the press from reporting events that transpire in the courtroom. . . . [T]his prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights." *Id.* at 567–68 (internal quotations omitted).

224. Twitter, Inc. v. Sessions, 263 F. Supp. 3d 803, 812 (N.D. Cal. 2017) (referring to Pentagon Papers, 403 U.S. 713 (1971)).

225. Schenck v. United States, 249 U.S. 47, 52 (1919).

226. Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

227. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

228. *Id.*

229. *Id.* at 719 (Black, J., concurring).

230. *Id.* at 726–27 (Brennan, J., concurring).

231. *Id.*

lives of both Americans and their foreign informants," but still denied the injunction because the court was "equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present."[232]

Courts have, however, upheld prior restraints of speech that contain classified national defense information.[233] For example, an injunction was upheld by the Fourth Circuit against an ex-CIA agent who wanted to publish books about the CIA's internal affairs.[234] While "[c]itizens have the right to criticize the conduct of our foreign affairs, . . . the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest."[235]

4. Potential for Defamation Exception?

The exceptions previously mentioned involve especially weighty public interests that tend to outweigh one person's First Amendment free speech rights—shielding the general public from obscene, pornographic material, conducting fair criminal trials, and protecting national security.[236] This leads to the essential inquiry of this Note—whether there should be an exception to the prior restraint doctrine that allows courts to enjoin statements found to be defamatory after a defamation trial. The interests of the public, here, are presumably the removal of false, potentially hurtful speech from public discourse and protection of the plaintiff's reputation. This interest must be weighed against the defamer's right to free speech.

Like obscenity, false statements of fact have little constitutional value.[237] They do not, however, have *no* constitutional value.[238] In fact, the Supreme Court has explicitly refused to admit that false statements of fact are unprotected by the First Amendment.[239] This is because false statements, even those deemed defamatory, "are inevitable if there is to be an open and vigorous expression of views in public and private conversation."[240] Indeed, false statements are "part of [the] exposition of ideas"—there is an essential competition of true and false statements that creates discussion and dialogue.[241] So, unlike the case of obscenity, the individual's interest in speaking carries constitutional weight because there

232. *See In re* Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986).

233. *See* United States v. Marchetti, 466 F.2d 1309, 1311 (4th Cir. 1972).

234. *Id.*

235. *Id.* at 1315.

236. *See supra* Sections III.C.1–3.

237. United States v. Alvarez, 567 U.S. 709, 718 (2012) (noting that "false statements 'are not protected by the First Amendment in the same manner as truthful statements'") (quoting Brown v. Hartlage, 456 U.S. 45, 60–61 (1982)).

238. *Id.* at 719 ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.").

239. *Id.*

240. *Id.* at 718.

241. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea.").

is societal value in false statements.[242] The balance is further upset by the fact that the government's interest in protecting one person's reputation is not nearly as weighty as protecting all children and the rest of the public from obscene material.[243]

Additionally, defamatory phrases are unlike obscenity because they are not immutable and extremely contextual.[244] While protected speech can be safeguarded in obscenity cases by narrowly defining the singular pornographic work in the injunction, defamatory phrases in one context may not be defamatory in another.[245] This makes the creation of a narrow injunction nearly impossible. Thus, the procedural protections that help to strike the balance between the government interest and the individual's First Amendment rights in obscenity cases are inapplicable to defamation.

It is true that the pretrial injunctions upheld under the third-party trial rights exception are similar in many ways to injunctions on statements deemed defamatory. They are both enacted by a judge and carry judicial sanctions for disobedience.[246] Also, they both attempt to protect one person by restricting the speech of another[247]—the content of which the judge must determine would harm the other person prospectively.[248] Applying the same balancing test as the third-party trial rights exception, however, would be inappropriate. While this exception deals with speech that infringes on another's constitutional rights, there is no constitutional right to be free from defamation, or any other sort of harm, by a nongovernment entity.[249] Because it is not under any constitutional mandate to do so, the government's interest in protecting a person from reputational harm by a nongovernment entity is not nearly as weighty as its interest in providing a fair trial by jury.

The national security exception to the prior restraint doctrine is exceedingly rare, and the circumstances which bring it about are extreme and implicate presumably the entire nation's interests; even then, the courts are wary to provide an exception.[250] If the Supreme Court is wary to provide such an exception when the security of the nation is at stake, how much more should our courts be wary to provide an injunction for a single person's reputation?

242. *Id.*

243. Miller v. California, 413 U.S. 15, 18–19 (1973).

244 *See supra* Subsections III.A.2, III.C.1.

245. *See supra* Subsections III.A.2, III.C.1.

246. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 543–45 (1976).

247. *Id.* at 547–51 ("But when the case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.").

248. *Id.* at 566–67 ("The dilemma posed underscores how difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors . . . .").

249. *See* John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1239 (2014) (describing that, "[u]nder the state action doctrine, most of the Constitution's protections of individual liberties restrict the conduct of government actors, but they do not restrict the conduct of private actors"). The only exception is the Thirteenth Amendment, which outlaws slavery by private and public actors. *Id.* at 1239 n.15. *See generally* U.S. CONST. amend. XIII.

250. N.Y. Times Co. v. United States, 403 U.S. 713, 718–19 (1971) (Brennan, J., concurring).

When compared to the existing exceptions, an injunction on defamation does not seem to pass the strict scrutiny test. First, the government's interests in ensuring the spread of only truthful information and in protecting one person against reputational damage are not especially weighty.[251] These interests do not meet the level of importance of national security, upholding fair trial rights, or shielding children and the public from obscenity.[252] These are wider societal interests which affect the citizenry at large. Defamation, on the other hand, negatively affects a single individual or entity. Second, these interests can be met through less restrictive means,[253] because the winning plaintiff of a defamation suit can use the judgment to prove the statements are false, and because he or she already is awarded money damages.[254] Finally, the nature of an injunction on future speech as a remedy does not provide sufficient procedural safeguards to keep it "precisely tailored" such that infringing on free speech is avoided as much as possible.[255] As discussed, these injunctions must be obeyed until modified or resolved, and the unconstitutionality of an injunction is not a defense.[256] In the meantime, the injunction is likely to be both over and underinclusive to truly defamatory statements.[257] So, what can be done? If these injunctions do not seem to pass strict scrutiny on their own, are injunctions on defamation unconstitutional per se? Is there ever a time that one of these injunctions is justified? There in fact may be, if a lawyer can be creative enough in framing the request according to traditional prior restraint exceptions. This possibility will be explained in Part IV.

IV. RECOMMENDATION

Injunctions on future speech as an equitable remedy in defamation cases should be considered to fall under the Supreme Court's traditional "prior restraint" doctrine and have a presumption of constitutional invalidity.[258] The Supreme Court assumed this was true in *Tory*, when it held that the injunction was "an overly broad prior restraint on speech."[259]

Some scholars argue that "a narrowly tailored injunction may be less burdensome on speech than subsequent money damages because the injunction can specifically target speech that is false and defamatory."[260] Yet, even if an injunction is narrowly tailored to the speech deemed defamatory, unlike money dam-

251. Babcock, *supra* note 62.
252. *Id.*
253. *Id.*
254. *See supra* Subsection III.A.2.
255. *See supra* Subsection III.A.2.
256. *See supra* Subsection III.A.1.
257. *See supra* Subsection III.A.2.
258. *See, e.g.*, Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
259. Tory v. Cochran, 544 U.S. 734, 738 (2005).
260. Ardia, *supra* note 68, at 58 ("An injunction targeting published speech that a court has found defamatory would likely be constitutional.").

ages, it is still inflexible to context and operates as a gag order upon the defendant.[261] This is why, as previously noted, there should not be a separate exception to the prior restraint doctrine for defamation, no matter the additional procedural protections for such an injunction.[262]

Yet, the common law maxim that "equity will not enjoin a libel" may be too extreme a position in the rare instance that the government actually *does* have an interest in the outcome of a defamation case.[263] No courts thus far have recognized the possibility that an injunction on future speech as a remedy to defamation may *itself* fall under one of the already recognized exceptions to the presumed unconstitutionality of prior restraints.[264] This Note recommends that, to the extent that an injunction on certain defamatory speech may fall under one of the few already recognized exceptions, and to the extent that it has enough procedural safeguards, it should be upheld. This would require the application of a two-step test.

When asking for an injunction against defamatory speech, first, the plaintiff would have the burden to identify and prove that the statement to be enjoined fits in one of the already-recognized weighty governmental interests that justify prior restraints (obscenity, fair trial rights, or national security) to overcome the individual's interest in free speech.[265] For example, the identified defamation may be likely to cause imminent rioting or assassination because it contains extremely inflammatory material about a public official. If it does, it may fit into the national security exception.[266] If a defamation that the defendant is widely circulating implicates a criminal defendant in a crime for which he or she is being tried, for example, this might unfairly bias a jury against him or her. Then, it might fulfill the test for the fair trial rights exception.[267] The most likely exception defamatory statements would fit into is the obscenity exception.[268] For, if a false statement about a person contains "sexually explicit material that violates fundamental notions of decency," it is also likely to damage the person's reputation and fulfill the elements of a defamation.[269] Should the plaintiff meet his or her burden of proof, the court would move on to the next step.

The second step asks whether there are sufficient procedural safeguards to protect against the injunction becoming overly broad in the future. Examples of sufficient safeguards can be drawn from prior Supreme Court cases. For example, imposing the restraint "within a specified brief period"[270] with a renewal clause that places the burden on the plaintiff to prove the injunction is still needed

261. *See supra* Subsection III.A.2.

262. *See supra* Subsection III.C.4.

263. Meyerson, *supra* note 18, at 308; *see generally* Chemerinsky, *supra* note 84 (arguing that the common law understanding should stand, and that injunctions on defamation are never constitutional).

264. This is true to the author's knowledge.

265. *See supra* Section III.C.

266. *See supra* Subsection III.C.3.

267. *See supra* Subsection III.C.2.

268. *See supra* Subsection III.C.1.

269. United States v. Williams, 553 U.S. 285, 288 (2008).

270. Freedman v. Maryland, 380 U.S. 51, 59 (1965).

would likely keep the injunction narrowly tailored to the context at hand. Additionally, "expeditious determination of the question" should be available if the defendant wants it.[271] Finally, the court must assure that the complainant bears the burden of asking for the injunction,[272] and of proving that the injunction is narrowly tailored and fits one of the exceptions. If the injunction has sufficient safeguards built in, it should be considered constitutional under the strict scrutiny test.

While this approach is unlikely to apply in most defamation cases, it gives courts an option to issue injunctions in cases where the public interest is especially weighty, while recognizing the important part that the prior restraint doctrine plays in protecting citizens from censorship and governmental overreach. It also encourages procedural safeguards to ensure that the injunction is no broader than necessary to protect these important public interests. Thus, it meets the Supreme Court's strict scrutiny standard that "an 'order' issued in 'the area of First Amendment rights' must be 'precis[e]' and narrowly 'tailored' to achieve the 'pin-pointed objective' of the 'needs of the case.'"[273]

While this approach does not address the problem of the judgment proof defendant, arguably, neither do injunctions. Though this is the oft-cited reason for issuing an injunction as a remedy—to protect the plaintiff from the "impecunious" judgment proof defendant—an injunction quite actually does not solve this problem.[274] Because an injunction applies only to the specific words the court has enjoined, "the defendant remains free to make technically different, but equally defamatory, statements."[275] This is exacerbated by the presence of the Internet, as online speech "echoes"—defamatory speech made online can be saved, copied and expanded upon by others, who remain untouched by the injunction.[276] An injunction, then, cannot protect the plaintiff from the very thing that caused its creation in the first place. Yet, to the extent that there are additional harms that an injunction on a defamatory statement can prevent, the recommended approach can effectively protect against these harms.

271. *Id.* at 60.

272. *Id.* at 59–60.

273. Tory v. Cochran, 544 U.S. 734, 738 (2005) (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183–184 (1968)).

274. McCarthy v. Fuller, 810 F.3d 456, 462 (7th Cir. 2015).

275. Stewart & Niehoff, *supra* note 86, at 29; *see also* Chemerinsky, *supra* note 84, at 173 (noting that because of the "richness of the English language and the myriad ways of expressing any thought . . . the only effective way to enjoin defamation would be . . . to keep the defendant from ever uttering another word about the plaintiff"—a result which greatly implicates the First Amendment.).

276. Ardia, *supra* note 68, at 7, 16. The Communications Decency Act also makes online intermediaries who host webpages immune from liability, including the reach of injunctions. *See* 47 U.S.C. § 230 (2018).

V. CONCLUSION

By including the free speech clause in the Bill of Rights, the Founding Fathers wanted to protect good and true ideas along with those that are seen as dangerous or wrong.[277] In this age of "Fake News,"[278] outrageous political discourse in which wild accusations are the norm,[279] and the amplificatory nature of these things via the Internet,[280] it is tempting to throw in the towel and agree that defamatory or untrue statements should not be protected. We wonder why we should allow Samia and Ann El-Moslimany to continue publishing the idea that poor Dr. Sindi is a fraud again.[281] When free speech seems most distasteful, however, is when it especially needs to be protected. This is not a new problem. Nearly eighty years ago, the Supreme Court defended overturning a prior restraint on false and outrageous statements in the name of free speech:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of [those] who . . . are[] prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[282].

To protect free speech for those ideas and statements most repugnant to us is to protect our own free speech—when the day comes that you or I have an unpopular thing to say, we will be glad we protected the right.

277. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, . . . or even stirs people to anger.").

278. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (May 9, 2018, 4:38 AM), https://twitter.com/realDonaldTrump/status/994179864436596736 ("The Fake News is working overtime. Just reported that, despite the tremendous success we are having with the economy & all things else, 91% of the Network News about me is negative (Fake).").

279. *See, e.g.*, Alessandro Bucciol, *False Claims in Politics: Evidence from the U.S.*, 72 RES. IN ECON. 196, 199 (2018) (finding around 1,200 false claims by politicians in 2012 alone).

280. *Id.* at 196 ("Thanks to the advent of the Internet, today there is a growing consensus on the idea that we live in a 'post-fact' or 'post-truth' era.").

281. *See generally* Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018).

282. Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).